Master Brisbane ak Itang v Robinson Lee & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–443–10 OF 2012
MOHD HISHAMUDIN, ABDUL WAHAB PATAIL AND BALIA YUSOF JJCA
11 OCTOBER 2013

Tort — Negligence — Duty of care — Whether Department/Ministry of Health owed common law duty of care to ensure appellant was immunised against Japanese Encephalitis virus — circular and guidelines issued by Health Ministry to Health Departments to immunise children living near pig farms imposed such duty — Whether imposition of such duty would open floodgate of litigation against Department/Ministry of Health

The issue that arose in the instant appeal was whether the court should hold that the Department/Ministry of Health owed a duty of care to the appellant to ensure he was immunised against the Japanese Encephalitis ('JE') virus. The appellant, who was 10 years old at the material time, contracted the disease and suffered brain damage which left him physically and mentally disabled and requiring lifetime care. He was the only one in his school, which was located less than 2km away from a pig farm, to have contracted the disease. Pigs were natural hosts of the JE virus and mosquitoes were known to transmit the virus from pigs to humans. By virtue of its proximity to the farm, the plaintiff's school was in a high-risk area for JE infection. Following the 1992 outbreak of the JE virus in the district where the school was, the Health Ministry in 2001 issued a circular and guidelines ('the circular and guidelines') directing the Sarawak Department of Health to immunise, inter alia, children between the ages of one and 15 living within pig farms or in areas within 2km of pig farms, against the JE virus. In spite of the circular and guidelines, the pupils of the appellant's school were not vaccinated at the time the appellant contracted the disease. Through his father as next friend, the appellant sued the respondents in the High Court for negligence. Although the trial judge ruled that the plaintiff's infection was as a result of the school's proximity to the pig farm, he held the Department/Ministry of Health was not liable in negligence. In his instant appeal, it was submitted that by reason of the circular and guidelines and considering the school's proximity to the pig farm, the Department of Health/Ministry of Health breached its common law duty of care to the plaintiff when it failed to vaccinate him against the JE virus. The appellant pursued his claim only against the fourth and sixth respondents, abandoning his claim against the others.

Held, dismissing the appeal with costs:

(1) It was not fair, just and reasonable to impose a common law duty of care on the Department/Ministry of Health to ensure the plaintiff was immunised against the JE virus because (a) there was no recent outbreak of the JE virus infection in areas near the appellant's school prior to the incident (b) the immunisation programme covered the whole country and implementation of the policy or programme required the co-operation of other government agencies (c) there were shortages of vaccine and budget constraints, and (d) to impose any common law duty of care under such circumstances would open a floodgate of litigation against the Department/Ministry of Health (see para 23).

[Bahasa Malaysia summary

Isu yang timbul dalam kes rayuan ini ialah sama ada mahkamah harus menentukan bahawa Jabatan/Kementerian Kesihatan terhutang kewajipan berjaga-jaga kepada perayu untuk memastikan perayu sudah diimunkan terhadap virus Japanese Encephalitis ('JE'). Perayu, yang berusia 10 tahun pada ketika itu, mendapat jangkitan itu dan mengalami kerosakan otak yang menyebabkan dia secara fizikal dan mental kurang upaya dan memerlukan rawatan seumur hidup. Perayu satu-satunya di sekolahnya, yang terletak kurang daripada 2km jauh dari ladang khinzir, yang mendapat jangkitan itu. Khinzir adalah tuan rumah semulajadi virus JE dan nyamuk dikenali untuk menghantar virus dari khinzir kepada manusia. Berdasarkan kedudukannya yang dekat dengan ladang, sekolah perayu adalah di kawasan yang berisiko tinggi untuk jangkitan JE. Berikutan wabak 1992 virus JE di daerah sekolah itu, Kementerian Kesihatan pada tahun 2001 mengeluarkan satu pekeliling dan garis panduan ('pekeliling dan garis panduan') mengarahkan Jabatan Kesihatan Sarawak untuk melalikan, antara lain, kanak-kanak berumur antara 1 dan 15 tahun yang tinggal di dalam ladang khinzir atau di kawasan-kawasan dalam 2km ladang khinzir, terhadap virus JE. Walaupun pekeliling dan garis panduan, murid-murid sekolah perayu tidak disuntik pada masa perayu mendapat jangkitan tersebut. Melalui bapanya sebagai sahabat wakil, perayu mendakwa responden di Mahkamah Tinggi untuk kecuaian. Walaupun hakim perbicaraan memutuskan bahawa jangkitan plaintif adalah disebabkan oleh jarak sekolah dengan ladang khinzir, hakim memutuskan Jabatan/Kementerian Kesihatan tidak bertanggungjawab dalam kecuaian. Dalam rayuan perayu, ia telah dikemukakan bahawa oleh sebab pekeliling dan garis panduan dan mempertimbangkan kehampiran sekolah dengan ladang khinzir itu, Jabatan Kesihatan/Kementerian Kesihatan melanggar kewajipan berjaga-jaga *common law* kepada plaintif apabila ia gagal untuk memvaksin perayu terhadap virus JE. Perayu meneruskan tuntutannya hanya terhadap

responden keempat dan keenam, meninggalkan tuntutannya terhadap yang lain.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah tidak adil, wajar dan munasabah untuk mengenakan kewajipan berjaga-jaga *common law* ke atas Jabatan/Kementerian Kesihatan untuk memastikan plaintif telah diimunkan terhadap virus JE kerana (a) tidak terdapat wabak baru terhadap jangkitan virus JE di kawasan berhampiran sekolah perayu sebelum kejadian itu (b) program imunisasi meliputi seluruh negara dan pelaksanaan dasar atau program yang memerlukan kerjasama agensi-agensi kerajaan yang lain (c) terdapat kekurangan vaksin dan kekangan bajet, dan (d) untuk mengenakan apa-apa kewajipan berjaga-dalam keadaan sedemikian akan membuka kemungkinan untuk tindakan undang-undang terhadap Jabatan/Kementerian Kesihatan (lihat perenggan 23).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, Reissue) paras 1248–1334.

Cases referred to

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (folld)
Loh Chiak Eong & Anor v Lok Kok Beng & Ors [2013] 1 MLJ 27, CA (folld)
Sutherland Shire Council v Heyman and Another (1985) 60 ALR 1, HC (folld)

Appeal from: Civil Suit No 22–119 of 2010 (High Court, Kuching)

Shanker Ram Asnani (Daniel Long with him) (Loke, King Goh & Partners Advocate) for the appellant.
Mohd Taufik bin Mohd Yusoff (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Kuching of 18 September 2012.

[2] The learned judge of the High Court had dismissed the appellant's/plaintiff's claim against the respondents/defendants for damages for the tort of negligence.

[3] We heard this appeal on 19 June 2013, and we reserved judgment.

[4] Today, we deliver our judgment.

[5] We, unanimously, dismiss this appeal with costs. A

[6] At the High Court six defendants were named. However, at the hearing of this appeal, the appellant/plaintiff focused liability only on the fourth and sixth respondents (the Director-General of Health of the Ministry of Health and the Government of Malaysia, respectively). The claims against the other respondents/defendants were abandoned. B

[7] Hereinafter, in this judgment, we shall be referring to the appellant/plaintiff as the 'plaintiff' and the respondents/defendants as the 'defendants'. C

[8] The plaintiff commenced the action by his next friend, his father (Itang ak Lang), as at the time of filing the action, he was an infant. D

[9] The facts of the case that led to the filing of the writ action for negligence are these.

[10] At the material time the plaintiff was 10 years old. He lived with his parents, grandmother and siblings at a village called 'Kampong Danau Melikin, Balai Ringin', in the District of Serian, Sarawak. He attended a primary boarding school called 'Sekolah Kebangsaan (Cina) Sungai Menyan, Serian' ('the school'). The plaintiff was admitted to the school in 2003. The school was situated near a pig farm. The pig farm was less than 2km away from the school. E F

[11] On Monday 25 September 2006, the plaintiff came down with fever. His teacher, the first defendant, sent the plaintiff to the government clinic at Balai Ringin for treatment. At the clinic, the medical staff who attended to him, prescribed some panadols and a cough syrup; and, thereafter, the first defendant took the plaintiff back to his village, as it was the practice of the school to send a sick pupil back to his/her home. On 28 September, the plaintiff's mother, seeing the plaintiff being very sick, sent him to the Serian District Hospital. There, he was treated for suspected meningitis. His condition, however, got worse. So, on 30 September he was transferred to the Sarawak General Hospital (SGH) where he was diagnosed to have been infected with the Japanese Encephalitis ('JE') virus. G H

[12] As a result of the infection, the plaintiff suffered brain damage. He is permanently disabled physically and mentally and requires lifetime care. I

[13] The learned trial judge made a finding that on a balance of probabilities the plaintiff was infected with the JE virus at the school, by reason of the school

being located near a pig farm. However, he ruled that the Department/Ministry of Health was not liable in negligence.

[14] It is not disputed that pigs are the natural hosts of the JE virus; and that from pigs the virus may be transmitted to human beings via the culex mosquitoes. It is also not in dispute that the plaintiff's school is a high-risk area (for JE infection) by reason of its proximity to a pig farm.

[15] The school is under the responsibility of the Ministry of Education. However, the authority responsible for the health of the pupils at the school was the Department of Health of Sarawak, which is under the Federal Ministry of Health.

[16] There was an outbreak of the JE virus in the District of Serian, Sarawak, in 1992.

[17] In 2001 there was a circular and guidelines issued by the Ministry of Health dated 10 May 2001 directing the Department of Health of Sarawak to immunise, among others, children of 1–15 years of age, living within pig farms or in areas within two kilometers of pig farms, against the JE virus. This circular and guidelines, although issued in 2001, was implemented in the State of Sarawak in January 2002. It is not in dispute, however, that, the implementation of the circular and guidelines was carried out at a very slow pace in Sarawak as the implementation of the immunisation program required the cooperation of other Ministries and Departments, such as the Education Department and the Education Ministry. Moreover, there were problems in the implementation of the program due to shortage of vaccines and shortage of governmental funds. Thus, in spite of the 2001 circular and guidelines, at the time of the plaintiff's infection, the pupils of the school, were yet to be vaccinated against the JE virus.

[18] At the material time, the plaintiff was the only person at the school infected with the JE virus. There is, however, no evidence that prior to the incident (that is, the plaintiff's infection) there has been an outbreak of the JE virus on any premises near the school.

[19] It is not in dispute that there is no specific legislation imposing a statutory duty or obligation on the part of the Department/Ministry of Health to immunise school pupils against the JE virus.

[20] The only issue in this appeal is whether in the light of the circular and guidelines of the Ministry of Health, the Department/Ministry of Health (and,

vicariously, the Government of Malaysia) is liable in negligence for the failure to vaccinate the pupils of the school against the JE virus, considering the proximity of the school to a pig farm.

[21] In dealing with this issue, we begin by asking ourselves this question: on the facts of the case, should we rule that the Department/Ministry of Health owe a duty of care to the plaintiff to ensure that he would be immunised against being infected with the JE virus? To put it in another way: on the facts of the case, is it fair, just and reasonable that the law should impose such a duty of care on the Department/Ministry of Health (see the judgment of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL); followed by this court in *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27).

[22] The plaintiff submits that by reason of the circular and the guidelines issued by the Ministry of Health, and considering the proximity of the school to a pig farm, there was a breach of the common law duty of care on the part of the Department of Health/Ministry of Health vis-a-vis the plaintiff when it fails to vaccinate the plaintiff against the JE virus.

[23] In our judgment, we hold that the Department/Ministry of Health did not owe a duty of care to the plaintiff to ensure that the plaintiff would be immunised against being infected with the JE virus. Having considered the circumstances of the case, we prefer to adopt a more cautious approach in deciding whether or not to impose any liability on the Department/Ministry of Health in relation to the plaintiff. We take the position that it would not be fair, just and reasonable to impose a common law duty of care on the Department/Ministry of Health to ensure that the plaintiff would be immunised against being infected with the JE virus. Firstly, there had not been a recent outbreak of JE virus infections in areas nearby to the school prior to the incident. Secondly, the immunisation program covers the whole country, and the implementation of the policy or program required the cooperation of other governmental agencies. Thirdly, there were the shortages of vaccines and budget constrains. Finally, to impose any common law duty of care on the Department/Ministry of Health under such circumstances will have far reaching implications: it would, in future, be opening a floodgate of litigation against the Department/Ministry of Health. In the Australian High Court case of *Sutherland Shire Council v Heyman and Another* (1985) 60 ALR 1 it was said:

> A public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constrains.

[24] In our view, the above principle should apply to the present case.

Appeal dismissed with costs.

Reported by Ashok Kumar